

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 22, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 96-2799

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

SHARON M. LANKFORD,

PLAINTIFF-APPELLANT,

v.

**LABOR AND INDUSTRY REVIEW COMMISSION, WICKES
LUMBER COMPANY AND NATIONAL UNION FIRE
INSURANCE,**

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Waupaca County:
PHILIP M. KIRK, Judge. *Affirmed.*

Before Vergeront, Roggensack and Deininger, JJ.

PER CURIAM. Sharon M. Lankford appeals from an order dismissing her action for judicial review of a decision of the Labor and Industry Review Commission (LIRC). The issue is whether Lankford's failure to timely serve LIRC deprived the circuit court of jurisdiction to review the denial of her

worker's compensation claim. We conclude that failure to strictly comply with the service requirements is a jurisdictional defect. Therefore, we affirm.

Lankford applied for her deceased husband's death benefits from the Department of Industry, Labor and Human Relations (DILHR). The Administrative Law Judge dismissed her application and LIRC affirmed that dismissal on March 20, 1996. On April 16, 1996, Lankford filed a summons and complaint seeking judicial review of LIRC's decision. On April 18, 1996, Lankford served DILHR in error and DILHR delivered the summons and complaint to LIRC on April 23, 1996. LIRC moved to dismiss the circuit court action because it was not served within thirty days of its decision. The circuit court ruled that Lankford's failure to timely serve LIRC was a jurisdictional defect and dismissed the action. Lankford appeals.

To commence an action for judicial review of a LIRC decision, the plaintiff must file and serve the summons and complaint within thirty days. Section 102.23(1)(a) and (b), STATS., and WIS. ADM. CODE § LIRC 3.06. The plaintiff also must serve LIRC within thirty days at its Madison office. *See* WIS. ADM. CODE § LIRC 3.06. Service by mail is effectuated upon actual receipt of the summons and complaint. *Id.*

Whether failure to timely serve LIRC is jurisdictional, is a question of law which we review de novo. *See Gomez v. LIRC*, 153 Wis.2d 686, 689, 451 N.W.2d 475, 476 (Ct. App. 1989).

Lankford urges reversal because she claims she substantially complied with the service requirements.¹ However, substantial compliance with service requirements has been expressly rejected. *See Gomez*, 153 Wis.2d at 693, 451 N.W.2d at 478. In *Gomez*, the plaintiff mistakenly served DILHR instead of LIRC. *See id.* at 688-89, 451 N.W.2d at 476. This court held that “Gomez’s failure to serve the commission [LIRC] cannot be excused as a mere ‘technical error.’ It was jurisdictional, and the trial court correctly dismissed the action.” *Id.* at 693, 451 N.W.2d at 478. We conclude that *Gomez* is dispositive of this appeal.

Lankford relies on *Nighbor v. DILHR*, 120 Wis.2d 375, 355 N.W.2d 532 (1984), for the proposition that her appeal rights should not be lost because of a technical, non-prejudicial error in securing the service of the summons and complaint. However, in *Nighbor*, LIRC was timely served. *See Nighbor*, 120 Wis.2d at 382, 355 N.W.2d at 536. *Nighbor* failed to name LIRC in the caption of the complaint. *See id.* *Nighbor* characterized this omission as a technical, non-jurisdictional error, in reliance on *Lees v. DILHR*, 49 Wis.2d 491, 496, 182 N.W.2d 245, 248 (1971) (“a caption is not a part of a pleading and that the nature of an action must be determined from the allegations of a pleading rather than its caption”). *See Nighbor*, 120 Wis.2d at 381-82, 355 N.W.2d at 536. Unlike *Nighbor*, Lankford’s error was her failure to timely serve LIRC, an indispensable party.

We conclude that serving the wrong entity is jurisdictional and is governed by *Gomez*, in which this court rejected many of the arguments which

¹ Lankford argues that these factors show substantial compliance: (1) the Worker’s Compensation Act is construed liberally to favor the employee; (2) many applicants in worker’s compensation cases pursue their claims *pro se*; (3) although she served the wrong entity (DILHR rather than LIRC), both entities are in the same building and the summons and complaint were timely delivered to LIRC’s building (albeit to DILHR which did not forward them to LIRC until five days later); and (4) the delay in serving LIRC was not prejudicial.

Lankford raises.² It is not comparable to *Nighbor*, in which the correct party was timely served with a pleading which contained an omission. *See Nighbor*, 120 Wis.2d at 381-82, 355 N.W.2d at 536. We conclude that *Gomez* is dispositive and warrants dismissal of Lankford's action because LIRC was not timely served. *See* § 102.23(1)(a) and (b), STATS.; WIS. ADM. CODE § LIRC 3.06; *Gomez*, 153 Wis.2d at 693, 451 N.W.2d at 478.

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

² Gomez contended that service (by his non-lawyer wife) on DILHR was merely a technical defect since DILHR is an agency closely related to LIRC.

Lankford attempts to distinguish her situation from *Gomez* on the basis of her covering correspondence, which expressly stated that a summons was included, and because she served DILHR before expiration of the thirty-day deadline. Lankford continues that “[t]he only incorrect indication on this letter was the five letters ‘DILHR’ instead of four letters ‘LIRC.’ Other than that, the two parties have the same street address, with different room numbers.” We are not persuaded that these distinctions exempt Lankford from *Gomez*'s holding. *Gomez* requires strict compliance with service requirements. *See Gomez v. LIRC*, 153 Wis.2d 686, 690, 451 N.W.2d 475, 477 (Ct. App. 1989). Lankford's service on the wrong entity does not toll the thirty days, nor can service on the wrong entity be imputed to the correct entity simply because the entities are related. In fact, *Gomez* characterized the same error and described DILHR and LIRC as “related, but very different agenc[ies].” *See id.* at 692, 451 N.W.2d at 478.

